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No. 86-1929

In The
Supreme Court of the United States
October Term, 1986

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NANCY W. McGINNIS,

Petitioner-Appellant,

v.

E.F. HUTTON & COMPANY, INC.,

Respondent-Appellee.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED FOR REVIEW

Whether the lower courts erred in holding that Petitioner must submit to arbitration her contract and tort claims against her employer—a brokerage firm—where Petitioner was a registered representative and had executed a "U-4" agreement which required Petitioner, pursuant to Rule 347 of the New York Stock Exchange and the Federal Arbitration Act, to arbitrate any dispute between Petitioner and her employer brokerage firm which may arise out of her employment or termination of employment?

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STATEMENT OF THE CASE

The procedural history of this litigation is correctly noted in Petitioner's Statement of the Case. Respondent[1] does, however, disagree with certain factual allegations contained in Petitioner's statement of the case; including Petitioner's assertion that she never performed any duties as a "stockbroker" while employed by Respondent (Petition, pages 1-2). Nevertheless, the factual disputes are irrelevant to the issues raised by the Petition for a Writ of Certiorari. The facts necessary to this Court's review, including the fact that Petitioner was a "registered representative" with the New York Stock Exchange ("NYSE"), are indisputable.

As a registered representative with the NYSE, Petitioner executed a Uniform Application for Securities Industry Registration (Form "U-4") in which she agreed to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitution or by-laws of the organizations with which I register. . . ." This language in the U-4 agreement incorporates New York Stock Exchange Rule 347, which in turn provides:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accord-

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[1] Respondent E.F. Hutton & Company, Inc., a New York Corporation, is a wholly owned subsidiary of E.F. Hutton Group, Inc. Respondent E.F. Hutton & Company, Inc. is not affiliated with any other corporation.

ance with the arbitration procedure proscribed elsewhere in these Rules.

Petitioner's Complaint attempts to set forth causes of action for outrageous conduct, breach of express and/or implied contract, retaliatory discharge, fraud and misrepresentation, and defamation and slander. It is clear, as held by the courts below, that all of the allegations in Petitioner's Complaint arose out of her employment or termination of employment with Respondent. Therefore, Petitioner's claims are arbitrable pursuant to the U-4 agreement and the Federal Arbitration Act.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. Petitioner's Claim That The Decisions Of The Courts Of Appeals Are In Conflict With Respect To The Issues Decided By The Sixth Circuit Court Of Appeals Is Incorrect

In her Petition for a Writ of Certiorari, Petitioner attempts to persuade the Court, pursuant to Supreme Court Rule 17, that a split exists among the Courts of Appeals with respect to the issues decided by the Sixth Circuit Court of Appeals in this case. Petitioner is attempting to create a conflict where none exists.

In the well reasoned opinion by Judge Keith, the Sixth Circuit Court of Appeals observed in this matter that "[t]he central issue before [the] court is whether a non-broker who signs a U-4 agreement must submit her

wrongful discharge claim to arbitration pursuant to NYSE Rule 347." *McGinnis v. E.F. Hutton & Company, Inc.*, 812 F.2d 1011, 1013 (6th Cir. 1987). With regard to this issue the Court of Appeals held:

> . . . [T]he plain language of Rule 347 encompasses employees who are registered with the NYSE and does not condition the requirement of arbitration on those registered representatives actually working as brokers. In this case, Plaintiff [Petitioner] fulfills the two requirements of NYSE Rule 347: (1) she was a registered representative within the NYSE, and (2) her claims arise out of her employment or termination of employment with a member of the NYSE. Neither the U-4 agreement nor Rule 347 contain any reference to the term broker. Thus, we conclude that contract and tort claims that relate to a registered representative's employment with a brokerage firm, even if the representative is not a broker, are properly arbitrable under NYSE Rule 347. *Id.*, at page 1014.

Regardless of whether Petitioner acted as a broker or a non-broker while employed by Respondent, it is clear that the Sixth Circuit Court of Appeals held that Petitioner, as a registered representative, must arbitrate claims that arose out of her employment or termination of employment with Respondent brokerage firm. None of the decisions cited in the Petition for a Writ of Certiorari hold that a registered representative who signed a U-4 agreement but did not function as a broker may avoid arbitrating claims arising out of his employment or termination of employment. Accordingly, there is no conflict between the Courts of Appeals with respect to this issue.

Petitioner also asserts that there are conflicting decisions of the Courts of Appeals with respect to the scope of

arbitration agreements under NYSE Rule 347. The alleged conflict arises out of the Second Circuit's decision in *Coudert v. Paine, Webber, Jackson & Curtis,* 705 F.2d 78 (2d Cir. 1983) and the decisions of the Eighth and Sixth Circuits in *Morgan v. Smith, Barney, Harris, Upman & Company,* 759 F.2d 1163 (8th Cir. 1984) and *Aspero v. Shearson American Express, Inc.,* 768 F.2d 706 (6th Cir. 1985), *cert. denied,* 106 S.Ct. 582 (1985).

Specifically, these decisions are concerned with what types of claims "arise out of the employment or termination of employment" as contemplated by Rule 347. According to Petitioner, the decisions are in conflict with respect to whether arbitration agreements apply equally to contract and tort claims (Petition, page 11).

Petitioner states that in *Coudert* a split panel of the Second Circuit held that Rule 347 did not apply to claims of tortious conduct occurring *after* the termination of the representative's employment. Petitioner correctly notes that this "temporal approach" of the Second Circuit was criticized by the Eighth Circuit in *Morgan.*

However, Petitioner fails to note that the Second Circuit, itself, later recognized in *Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 725 F.2d 192 (2d Cir. 1984), that this aspect of its reasoning in *Coudert* was misplaced. In *Downing,* the Second Circuit stated that the fact that a dispute arose after the employment had terminated did not, by itself, preclude arbitration of the dispute.

It would seem, therefore, that at least the temporal approach rationale of the Second Circuit's decision in *Coudert,* which has been criticized by the other Courts of Appeals, has been redressed the Second Circuit, itself. Ac-

cordingly, there is no conflict between the Courts of Appeals on this issue.

Since *Downing* involved the arbitrability of a non-competition agreement, Petitioner might argue that the *Coudert* decision's finding that defamation claims arising after an individual's termination of employment are non-arbitrable still presents a conflict among the Circuits with respect to the scope of arbitration. However, in *McMahon v. R.M.S. Electronics, Inc.*, 618 F. Supp. 189 (S.D.N.Y. 1985), the court held that a former employee's defamation claims for statements made to shareholders and in filings with the SEC were within the scope of arbitration where the alleged defamatory statements were integrally linked to the contractural relationship between the parties. The *McMahon* court had the benefit of the Second Circuit's decisions in both *Coudert* and *Downing* in ruling that the claims were arbitrable.

Similarly, Petitioner's claims for defamation in the case at bar are integrally linked to the contractural, i.e., employment, relationship between the parties. Therefore, it would appear that even the Second Circuit would find that all of Petitioner's claims are within the scope of the arbitration agreement. In any event, it appears that any "conflict" which exists is a conflict arising from a single discredited opinion of the Second Circuit.

Recently, in *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447 (9th Cir. 1986), the Ninth Circuit adopted the reasoning of the Sixth Circuit (*Aspero*) and Eighth Circuit (*Morgan*) with respect to the scope of arbitration under NYSE Rule 347. The *Zolezzi* court held that a former stockbroker's defamation and invasions of privacy claims

—based on statements of a supervisory employee relating to the former employee's handling of customer accounts and the possible consequences of these actions—were arbitrable even though the statements were made after the plaintiff terminated his employment.

Petitioner attempts to limit the Eighth Circuit's *Morgan* decision by insisting that the court's order of arbitration was limited to issues involving the plaintiff's performance as *a broker* (Petition, pages 9-10). However, as the Court of Appeals below noted, *Morgan* simply decided whether tort claims as well as contract claims were arbitrable under NYSE Rule 347. In *Morgan* the plaintiff was a broker and, therefore, the court analyzed the case in terms of the plaintiff's employment status.

> . . . However, there is no language in *Morgan* which even hints that its holding is limited to brokers. On the contrary, the court in *Morgan* indicated that its holding would have wide spread effect. Specifically, the court broadly interpreted the phrase from Rule 347 "arising out of employment or termination of employment" and held that "the language requires arbitration of tort as well as contract claims which involve significant aspects of the employment relationship, including but not limited to explicit contractural terms." [Citation omitted] *McGinnis v. E. F. Hutton & Company, Inc.*, 812 F.2d at page 1014.

From the foregoing, it is clear that Petitioner is attempting to create a conflict between the Courts of Appeals with respect to the scope of arbitration agreements between registered representatives and brokerage firms where no such conflict truly exists. The Sixth, Eighth, and Ninth Circuits have all recognized the arbitrability of both contract and tort claims by former brokers, who are "regis-

tered representatives", even where the conduct occurs after the employee is terminated. Although *Coudert* held that certain tort claims arising after an employee's termination were not arbitrable, it would appear that both the court's holding and its rationale have been severely eroded by *Downing,* supra, and *McMahon,* supra. Therefore, as previously noted, if any conflict exists it is only within the Second Circuit.

II. Petitioners' Claim That Important Questions Of Federal Law Have Been Decided By The Court Of Appeals Which Have Not Been, But Should Be, Settled By This Court Is Incorrect.

Petitioner's second and final proffered justification for seeking Certiorari asserts that the Court of Appeals decided important questions of federal law that have not been, but should be, settled by this Court. Apparently, Petitioner is referring to the Court of Appeals' decision below respecting the scope of arbitration under NYSE Rule 347 and whether the Rule applies to "registered representatives" who do not function as brokers.

The federal policy favoring arbitration as expressed by Congress in the Federal Arbitration Act provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable and enforcible, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Section 4 of the Act mandates judicial enforcement of arbitration agreements where a party has failed, neglected, or refused to arbitrate.

This Court has twice this term reaffirmed its position with respect to the broad scope of arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* In *Shearson/American Express, Inc. v. McMahon,* 55 U.S.L.W. 4757 (U.S. June 9, 1987), this Court held that customers of a brokerage firm who agree to arbitrate any controversies relating to their accounts must arbitrate their § 10(b) claims under the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78(j)(b), as well as any claims brought under the Racqueteer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* And in *Perry v. Thomas,* 55 U.S.L.W. 4832 (U.S. June 15, 1987), this Court held that the national policy favoring arbitration expressed by the Federal Arbitration Act preempted a state statute that attempted to exempt from arbitration security sales commission disputes.

These decisions reaffirm this Court's prior holdings expressing a clear federal policy favoring arbitration. *See, Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983); and *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985) (state-law claims are arbitrable under the Federal Arbitration Act).

The agreements in *Shearson/American Express v. McMahon* and *Dean Witter Reynolds v. Byrd,* although between customers and brokerage firms, contain almost identical language to the arbitration agreement in the case at bar between Petitioner, a registered representative, and Respondent brokerage firm. There is no reason in logic why this Court's decisions favoring arbitration should not apply to the instant case.

Moreover, this Court has long held that any doubts as to whether an issue is arbitrable must be resolved in favor of arbitration. As the Court of Appeals noted:

> First, arbitration is a contractural obligation which is governed by general principles of contract interpretation. Second, under federal law, when the language is ambiguous or unclear, any doubts concerning the scope of arbitrability should be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed. 2d 765 (1983). . . . *McGinnis,* 812 F.2d at page 1013.

These principles inevitability lead to the Court of Appeals' holding in the case at bar. Petitioner was a registered representative within the plain language of the agreement. Therefore, well established principles dictate the result reached by the Courts below, i.e., that Petitioner must arbitrate her claims which arise out of her employment and termination of employment with Respondent.

It appears obvious that all of the claims contained in Petitioner's Complaint arose out of her employment or termination of employment with Respondent. Even if there were doubts with respect to the arbitrability of any particular claims contained in Petitioner's Complaint, it is clear that the long standing federal policy—and legal principle—favoring arbitration would require arbitration of all such claims.

Petitioner argues that accepting the Court of Appeals' reasoning in the case at bar would permit brokerage firms to require employees who are not brokers or registered representatives to become registered and, thereby, subject them to the arbitration requirements of NYSE Rule 347. Petitioner insists that this was not the purpose of NYSE Rule 347 (Petition, pages 14-15). However, the Rule clearly provides that any "registered representative"

(rather than "any broker" or "anyone functioning as a broker") who executes a U-4 agreement thereby agrees to arbitrate any dispute arising from her employment or termination of employment.

This is precisely the purpose of NYSE Rule 347, and the federal policy favoring arbitration is hardly inconsistent with such a conclusion. If customers are compelled to arbitrate disputes arising from the handling of their accounts with a brokerage firm, there is no reason why an employee of the firm who is a "registered representative" should not be expected to be compelled to arbitrate disputes which arise from her employment or termination of employment.

In short, there is nothing at all novel or surprising about the Court of Appeals' ruling. To the contrary, it is entirely consistent with this Court's decisions with respect to the scope of arbitration.

Therefore, since there are no new important federal questions raised by the Sixth Circuit Court of Appeals' decision, the Petition for a Writ of Certiorari should be denied.

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CONCLUSION

It is respectfully submitted that Petitioner has failed to sustain her burden under Rule 17 of the Supreme Court Rules to establish that there are special and important reasons why the writ should be granted. Contrary to Petitioner's position, there is no split in the Courts of Appeals with respect to whether a non-broker who is a registered representative may be compelled to arbitrate claims arising out of her employment or termination of employment. Moreover, the opinion of the Court of Appeals did not decide an important federal question which has not been, but should be, decided by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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